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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5718
DATE COMPLAINT FILED: March 16, 2006
DATE OF NOTIFICATION: March 22, 2006
LAST RESPONSE RECEIVED: May 11, 2006
DATE ACTIVATED: Aug. 21, 2006

EXPIRATION OF SOL: March 16, 2011

COMPLAINANTS:

Illinois Republican Party

RESPONDENTS:

Citizens for Giannoulis and Demetris Giannoulis,
in his official capacity as Treasurer
Alexander Giannoulis
Jesse L. Jackson, Jr.
Barack Obama

RELEVANT STATUTES:

2 U.S.C. § 431(9)(A)
2 U.S.C. § 434(f)(3)
2 U.S.C. § 441a
2 U.S.C. § 441b
2 U.S.C. § 441i(e)
11 C.F.R. § 100.29
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: Disclosure Reports; Commission Indices

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns allegations that Citizens for Giannoulis and Demetris Giannoulis in his official capacity as Treasurer ("Giannoulis Committee"), Alexander Giannoulis, Congressman Jesse L. Jackson, Jr., and Senator Barack Obama violated the Federal Election Campaign Act of 1971, as amended ("the Act"). At issue in the complaint are two campaign

1 advertisements paid for by the Giannoulas Committee.¹ The first advertisement is a radio
2 advertisement in which Jackson and Obama endorse Giannoulas, who was running for the office
3 of Illinois State Treasurer. The second advertisement is a billboard ad in which only Jackson
4 endorses Giannoulas. The complaint alleges that these advertisements constituted
5 electioneering communications and coordinated communications that were improperly financed
6 with non-federal funds.

7 Based on available information discussed below, we recommend that the Commission:
8 (1) find no reason to believe that the Giannoulas Committee violated the Act by financing
9 electioneering communications with impermissible non-federal funds; 2) find no reason to
10 believe that Barack Obama received in-kind contributions in the form of coordinated
11 expenditures; and 3) dismiss, as a matter of prosecutorial discretion, the allegation that Citizens
12 for Giannoulas, Demetris Giannoulas in his official capacity as Treasurer, and Alexander
13 Giannoulas made, and that Jesse Jackson, Jr. received, an in-kind contribution in the form of a
14 coordinated expenditure in violation of 2 U.S.C. §§ 441a, 441b, and 441i(e). *See Heckler v.*
15 *Chaney*, 470 U.S. 821 (1985).

16 **II. FACTS**

17 The complaint arises from two campaign advertisements paid for by the Giannoulas
18 Committee. The first advertisement involves a radio advertisement in which Jackson and Obama
19 endorse Giannoulas for the office of Illinois State Treasurer. *See* Attachment A. The complaint
20 contends that the radio ad aired 30 days before the Democratic primary in March 2006, and the
21 responses do not dispute the contention. The following is a transcript from the radio ad:

¹ The Giannoulas Committee is the principal committee for Alexander Giannoulas, who was the Democratic candidate for the office of Illinois State Treasurer in the 2006 general election.

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1 **VOICE OVER:** Congressman Jesse Jackson, Jr. and Senator Barack Obama talk about
2 why they endorse Alexi Giannoulias for State Treasurer.

3
4 **CONGRESSMAN JACKSON, JR.:** These are challenging times, times that demand
5 qualified elected leaders who have demonstrated skills. In this environment, we can no
6 longer afford politics as usual. For the State Treasurer, there is no more qualified
7 individual than Alexi. When it comes to fiscal management, he stands alone. It is indeed
8 a privilege and an honor to extend my whole-hearted unqualified endorsement to Alexi
9 Giannoulias.

10
11 **SENATOR OBAMA:** Alexi Giannoulias. He's one of the most outstanding young men
12 that I could ever hope to meet. He's somebody who cares deeply about people. What we
13 want in the job of Treasurer is someone who actually knows how money works and
14 knows how to manage it and makes sound investments that protect people's pensions.

15
16 **VOICE OVER:** Alexi Giannoulias: Bank Vice President; financial expert; Democrat
17 for Treasurer.

18
19 **SENATOR OBAMA:** Alexi Giannoulias is going to be an outstanding treasurer.

20
21 **ALEXI GIANNOULIAS:** Paid for by Giannoulias for Treasurer.

22
23 The second advertisement at issue is a billboard ad with a picture of Jackson standing
24 behind Giannoulias. The text states: "Alexi GIANNOULIAS for State Treasurer; Honesty and
25 Integrity – For a Change; Paid for by Giannoulias for State Treasurer." See Attachment B.

26 **III. ANALYSIS**

27 **A. Alleged Violations of Electioneering Communications Provisions**

28 The complaint alleges that respondents violated the "soft money" electioneering
29 communications provisions of the Act, by spending non-federal funds on the radio
30 advertisement. Complaint at 2. The complaint argues that because Illinois state law permits
31 acceptance of corporate money, the Giannoulias Committee used prohibited funds to fund the
32 radio ad that featured Jackson and Obama. Obama's response claims that the radio ad does not

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1 qualify as an electioneering communication because 11 C.F.R. § 100.29(c)(5) exempts the
2 endorsement of state and local candidates from the definition of electioneering communications.

3 An electioneering communication is a "broadcast, cable or satellite communication" that:

4 1) refers to a clearly identified federal candidate; 2) is made within 60 days before a general
5 election or 30 days before a primary election; and 3) is targeted to the relevant electorate. *See*
6 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(a).² If the advertisement at issue constitutes an
7 electioneering communication, the Giannoulas Committee would have been prohibited from
8 paying for it with funds from prohibited sources. *See* 2 U.S.C. § 441b(b)(2). However,
9 11 C.F.R. § 100.29(c)(5) provides an exemption from the statutory definition of electioneering
10 communication for any communication that is paid for by a state or local candidate and "does not
11 promote, support, attack or oppose any Federal candidate." *Id.*

12 In this matter, the radio ad, paid for by the Giannoulas Committee, does not promote,
13 support, attack or oppose Jackson or Obama because it was solely focused on Giannoulas'
14 candidacy.³ In the radio ad, Jackson and Obama simply endorse Giannoulas and do not make
15 any comments about their own candidacies or qualifications for federal office. Given that the
16 radio ad solely addresses Giannoulas' candidacy and is paid for by the Giannoulas Committee,
17 the ad appears to be exempt from the definition of electioneering communication under §
18 100.29(c)(5). Accordingly, we recommend that the Commission find no reason to believe that

² Because an electioneering communication is limited to a "broadcast, cable or satellite communication," the billboard advertisement featuring Jackson would not satisfy the statutory definition of an electioneering communication under 2 U.S.C. § 434(f)(3)(A)(i)

³ Commission disclosure reports confirm that both Obama and Jackson qualify as federal candidates under the Act as they have received more than \$5,000 in contributions and spent more than \$5,000 in expenditures. *See* 2 U.S.C. § 431(2).

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1 the Giannoulas Committee and Giannoulas violated the Act by financing electioneering
2 communications with non-federal funds.

3 **B. Alleged Coordination**

4 The complaint alleges that the radio and billboard advertisements are communications
5 that constitute "improper coordination." Complaint at 2. A payment for a coordinated
6 communication is an in-kind contribution to the candidate's authorized committee with which it
7 is coordinated and must be reported as an expenditure made by that candidate's authorized
8 committee.⁴ 11 C.F.R. § 109.21(b)(1). Further, in-kind contributions to federal candidates or
9 their committees are subject to the contribution limitations, source prohibitions and disclosure
10 requirements of the Act. *See, e.g.*, 2 U.S.C. §§ 441a, 441b, and 441i(e). Under 11 C.F.R.
11 § 109.21(a),⁵ a communication is coordinated with a candidate if the communication: (1) is paid
12 by a person other than the federal candidate, the federal candidate's authorized committee,
13 political party committee, or any agent of any of the foregoing; (2) satisfies at least one of the
14 content standards identified in 11 C.F.R. § 109.21(c),⁶ and (3) satisfies at least one of the conduct
15 standards identified in 11 C.F.R. § 109.21(d).⁷ *See* 11 C.F.R. § 109.21(a).

⁴ The Act defines expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" as in-kind contributions. 2 U.S.C. § 441a(a)(7)(B)(i).

⁵ Although the Commission recently revised its coordinated communications regulation, the alleged conduct took place approximately four months before the revised regulations took effect on July 10, 2006. Thus, we analyze whether the ads constituted coordinated communications under the 3-prong test for coordinated communications that was in effect prior to July 10, 2006.

⁶ The content element of the coordination regulation is satisfied if the communication at issue meets at least one of four content standards: (1) it is an electioneering communication as defined in 11 C.F.R. § 100.29(a); (2) it is a public communication that republishes, disseminates, or distributes candidate campaign materials; (3) it is a public communication containing express advocacy; or (4) it is a public communication, in relevant part, that refers to a clearly identified federal candidate, is publicly distributed or disseminated 120 days or fewer before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate. *See* 11 C.F.R. § 109.21(c). The Commission has clarified that § 109.21(c)(4)(i) and (ii) are satisfied only if the public communication is publicly distributed or disseminated during the relevant time periods "before an election in which

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1 Respondents contend that the communications do not meet the statutory definition of a
2 coordinated expenditure because spending must first constitute an "expenditure," which is
3 undertaken "for the purpose of influencing" a federal election. 2 U.S.C. §§ 431(9)(A),
4 441a(a)(7)(B)(iii); *see also, Shays v. Meehan*, 414 F.3d 76, 99 (D.C. Cir. 2005). They also note
5 that the Commission has recently created a safe harbor for federal candidates' endorsements of
6 state candidates. *See* 11 C.F.R. § 109.21(g).

7 Barack Obama's endorsement of Giannoulas in the radio ad does not appear to be a
8 coordinated communication because the endorsement fails to satisfy any of the content standards
9 specified in § 109.21(c). Specifically, the radio ad is not an electioneering communication, does
10 not expressly advocate or discuss Obama's candidacy in any manner, and was not distributed
11 120 days prior to a primary or general election in which Obama would appear on the ballot.
12 Thus, we recommend that the Commission find no reason to believe that Barack Obama violated
13 2 U.S.C. §§ 441a, 441b, and 441i(e) by accepting excessive or prohibited in-kind contributions.

14 However, it appears that Jackson's endorsement of Giannoulas in the radio and the
15 billboard ads would appear to satisfy the 3-prong test for a coordinated communication because:
16 1) the ads were paid for by someone other than the federal candidate (Giannoulas), 11 C.F.R.
17 § 109.21(a)(1); 2) the communications clearly referred to Jackson, a federal candidate, and were

that candidate or another candidate seeking election to the same office is on the ballot." 71 Fed. Reg. 33190 at 33198. *See also* AO 2004-01 (Bush-Cheney/Kerr); AO 2005-18 (Reyes) ("Where someone is paying for a communication that makes reference to a federal candidate, the potential in-kind contribution arises under the 120 day prong of the coordinated communication regulation only where the election of the referenced candidate falls within 120 days of the communication.") (concurring opinion of Chairman Thomas, Vice Chairman Michael Toner, Commissioners Mason, McDonald, and Weintraub).

⁷ The conduct element of the coordinated communication test requires the advertisement to meet one of the six conduct standards set forth in 11 C.F.R. § 109.21(d): (1) communications made at the request or suggestion of the relevant candidate or committee; (2) communications made with the material involvement of the relevant candidate or committee; (3) communications made after substantial discussions between the person paying for the communication and the clearly identified candidate; (4) the use of a common vendor; (5) the actions of a former employee; and (6) specific actions relating to the dissemination of campaign material. 11 C.F.R. § 109.21(d).

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publicly disseminated 120 days or fewer before the Illinois Democratic primary and directed to voters in Jackson's jurisdiction, Chicago, Illinois, 11 C.F.R. § 109.21(c)(4); and 3) Jackson was materially involved in the content of the communication, 11 C.F.R. § 109.21(d)(2).⁸ Thus, the radio advertisement constitutes an in-kind contribution from the Giannoulas Committee to Jesse L. Jackson, Jr., and such contribution was required to comply with the limitations, source prohibitions and disclosure requirements of the Act.

Although respondents are correct that new 11 C.F.R. § 109.21(g) creates a safe harbor for endorsements of state candidates by federal candidates, § 109.21(g) did not go into effect until July 10, 2006, after the radio advertisement was aired and paid for. Nevertheless, we recommend that the Commission dismiss this allegation as a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985). The Commission recently adopted § 109.21(g) because the Commission found that the "coordinated communication regulation identifies communications that are for the purpose of influencing a Federal election" and that there was no evidence that Congress intended to restrict the established practice of endorsements that do not promote, support, attack or oppose the endorsing candidate. 71 Fed. Reg. 33190, at 33202 (citing 2 U.S.C. § 431(9) and 11 C.F.R. § 109.21). Given that neither of the ads mentions Jackson's candidacy for federal office, we believe that the same rationale underlying the Commission's promulgation of § 109.21(g) warrants dismissal here.

IV. RECOMMENDATIONS

1. Find no reason to believe that Citizens for Giannoulas, Demetris Giannoulas in his official capacity as Treasurer, and Alexander Giannoulas violated the Act by financing electioneering communications with non-federal funds;

⁸ The Commission has determined that a federal candidate's appearance in a communication creates the presumption that the federal candidate was materially involved in the content of the communication and satisfies the conduct prong. *See, e.g.*, AO 2003-25 (Weinzapfel); AO 2004-1 (Forgy Kerr).


2. Find no reason to believe that Barack Obama violated 2 U.S.C. §§ 441a, 441b, and 441i(e) by accepting excessive or prohibited in-kind contributions;
3. Dismiss, as a matter of prosecutorial discretion, the allegation that Citizens for Giannoulis, Demetris Giannoulis in his official capacity as Treasurer, and Alexander Giannoulis made, and that Jesse Jackson, Jr. received, an in-kind contribution in the form of a coordinated expenditure in violation of 2 U.S.C. §§ 441a, 441b, and 441i(e);
4. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Date: 11/21/06

BY:


Ann Marie Terzaken
Assistant General Counsel


Jin Lee
Attorney

Attachments

- A. Transcript of Radio Advertisement
- B. Copy of Billboard Advertisement

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ATTACHMENT A

**TRANSCRIPT FROM GIANNOULIAS FOR TREASURER RADIO SPOT
FEATURING JESSE JACKSON, JR. AND SENATOR BARACK OBAMA**

VOICE OVER: Congressman Jesse Jackson Jr. and Senator Barack Obama talk about why they endorse Alexi Giannoulias for State Treasurer.

CONGRESSMAN JACKSON JR.: These are challenging times, times that demand qualified elected leaders who have demonstrated skills. In this environment, we can no longer afford politics as usual. For the State Treasurer, there is no more qualified individual than Alexi. When it comes to fiscal management, he stands alone. It is indeed a privilege and an honor to extend my whole-hearted unqualified endorsement to Alexi Giannoulias.

SENATOR OBAMA: Alexi Giannoulias. He's one of the most outstanding young men that I could ever hope to meet. He's somebody who cares deeply about people. What we want in the job of Treasurer is someone who actually knows how money works and knows how to manage it and makes sound investments that protect people's pensions.

VOICE OVER: Alexi Giannoulias: Bank Vice President; financial expert; Democrat for Treasurer.

SENATOR OBAMA: Alexi Giannoulias is going to be an outstanding treasurer.

ALEXI GIANNOULIAS: Paid for by Giannoulias for Treasurer

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ATTACHMENT B

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 CLEAR CHANNEL



Alexi
GIANNOULIAS
For
State Treasurer

Honesty and Integrity - For A Change
For the People of the State of New York

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